

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLINTON LEWIS McGEE,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 197150
Recorder's Court
LC No. 94-011199

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

Defendant was charged with delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). Following a bench trial, defendant was convicted of attempted possession with intent to deliver less than fifty grams of cocaine, MCL 750.92; MSA 28.287. Defendant was sentenced to three years' probation with the first six months to be served in jail. Defendant was subsequently charged with a probation violation. Following a hearing, the trial court found defendant guilty of the probation violation and sentenced him to a term of forty to sixty months' imprisonment. Defendant appeals as of right. We reverse.

Defendant argues that the trial court erred in finding him in violation of his probation by arriving at its conclusion through application of an overly lenient evidentiary standard. We agree. "Questions of law and questions of the application of the law to the facts receive de novo review . . ." *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996), quoting *United States v Thomas*, 62 F3d 1332, 1336 (CA 11, 1995).

When alleging a probation violation, "[t]he state has the burden of proving a violation by a preponderance of the evidence." MCR 6.445(E)(1). A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed, 1990), p 1182 (citation omitted). In contrast, "Probable cause exists where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in

themselves to warrant a cautious person to

believe that the accused is guilty of the offense charged.” *People v Orzame*, 224 Mich App 551, 558; 570 NW2d 118 (1997). Clearly, probable cause is the lesser of these two evidentiary standards. *In re Fultz*, 211 Mich App 299, 306; 535 NW2d 590 (1995), rev’d on other grounds 453 Mich 937 (1996).

In the instant case, the trial court stated that it needed to find only probable cause to believe probation had been violated. At the probation violation hearing, two witnesses identified defendant as a participant when they were robbed in a restaurant parking lot. However, neither witness identified defendant when presented with a line-up sheet,¹ and one of the witnesses testified that the incident occurred in an area of the parking lot where there were no lights. Further, defendant subpoenaed an employee from the restaurant who supposedly had had a clear view of the crime, but who was not present in court following completion of the prosecution’s proofs. Defense counsel protested that the witness’ testimony was essential, but the trial court proceeded without that witness, holding that the testimony was unnecessary as it merely created a question of fact where probable cause alone was required to establish a probation violation. The trial court then found probable cause of violation of probation without delineating findings of fact. On this record, it is clear that the trial court disposed the matter under the lenient probable-cause standard instead of under the proper and more stringent preponderance-of-the-evidence standard.

The prosecution argues that application of the inappropriate standard of proof was harmless error in this instance. We disagree. In *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148; 532 NW2d 899 (1995), the trial court, in vacating the parole board’s decision, applied a higher standard of review than was warranted. Despite the development of a complete record, this Court remanded, requiring the trial court to apply the appropriate standard of review in light of the record and statutory requirements. *Id.* at 152-153. Similarly, where a trial court applied the preponderance-of-the-evidence standard to a juvenile proceeding, this Court remanded the matter for application of the proper and stricter beyond-a-reasonable-doubt standard of proof. *In re Weiss*, 224 Mich App 37, 42; 568 NW2d 336 (1997). In both cases, remand was appropriate because the reviewing court could not guess whether the outcome would have been different had the trial court applied the proper standard in the first instance.

Because in this case the trial court applied an erroneously lenient standard of proof, declining to make provisions to hear a key defense witness in the process, we reverse and remand for further proceedings consistent with this opinion. Because our resolution on this issue renders defendant’s remaining issue on appeal moot, we need not consider it. We remind the trial court on remand to articulate factual findings for the record, and, if imposing a sentence, to explain its attendant reasoning as required by MCR 6.556(G) and MCR 6.425(D)(2)(e). We do not retain jurisdiction.

Reversed and remanded.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O’Connell

¹ One witness identified an individual other than defendant. The other witness identified three individuals, but did not specify if one was defendant before the court interjected.